



Ceres Accelerator
for Sustainable Capital Markets

April 11, 2022

Ms. Vanessa A. Countryman, Secretary
Securities & Exchange Commission
100 F Street, NE
Washington, DC 20549-1000

File No. S7-06-22

Dear Ms. Countryman:

Ceres is pleased to submit the following comments regarding Release No. 33-11030, *Modernization of Beneficial Ownership Reporting*, 87 Fed. Reg. 13846 (March 10, 2022).

The Ceres Investor Network includes more than 200 institutional investors, managing more than \$49 trillion in assets. We work with our members to advance sustainable investment practices, engage with corporate leaders, and advocate for key policy and regulatory solutions to accelerate the transition to a net zero emissions economy. Our global collaborations include Climate Action 100+, The Investor Agenda, the Paris Aligned Investment Initiative, and the Net Zero Asset Managers initiative.

Institutional investors we work with seek to engage portfolio companies on a range of sustainability issues, including dialogue with company executives and board members and the sponsoring of shareholder proposals at annual meetings. These investors have found that collaborating with each other in order to raise specific issues at individual companies can be an effective means of communicating the concerns of multiple investors to those companies.

Introduction.

The proposed rule would make significant changes to the disclosure requirements in Rule 13D and Rule 13G by shortening the reporting period, adopting a new definition of “group,” deeming holders of certain cash-settled derivatives as beneficial owners for purposes of those rules, and imposing certain disclosure requirements on such holders. We do not comment below on those features, but will instead focus on the proposed Rule 13d-6(c), which, according to the summary to the rule, is intended to “clarify and affirm the operation” of Rules 13D and 13G in order to permit investors “to communicate and consult with each other, jointly engage issuers and execute certain transactions without being subject to regulation as a group.”

Discussion.

Ceres welcomes this clarification not because it believes that the current rules inhibit investors’ ability to engage with other investors and portfolio companies, but to remove any possible doubts about the validity of these forms of engagement. In the comments below we explain the reasons for this view, and in so doing, we respond to some of the specific questions (Nos. 69-74) as posed by the Commission.

We view the heart of the proposed Rule 13d-6(c) to be the statement that this exemption from Rules 13D and 13G is available to investors provided that “[s]uch persons, when taking such concerted actions, are not directly or indirectly obligated to take such actions.” According to the rulemaking release, evidence that an investor is “directly or indirectly obligated” exists with respect to obligations such as those created “pursuant to the terms of a cooperation agreement or joint voting agreement.” 87 Fed. Reg. at 13873.

Members of the Ceres Investor Network have operated collectively and without such “obligations” for years. An individual fund may agree to act in concert with other funds on a given matter, such as writing a letter to the board of directors or co-sponsoring a shareholder resolution, but each fund will have reached such a decision as a matter of individual discretion, consistent with the funds’ fiduciary and other legal obligations. The investors we work with do not enter into cooperative joint voting agreements.

We make this point because we believe that the proposed rule could be clarified in several key respects.

1.) Investors engage in several types of communications with other shareholders. The first type involves communications *among* possibly like-minded shareholders to pursue a joint company engagement strategy. The proposed Rule 13d-6(c) seeks to protect such communications.

The second type of communication occurs between institutional investors and investors such as a hedge fund, who may have filed a Form 13D and who may be considered a “group” that is running a contested director campaign. It is not uncommon for this category of investors to reach out broadly to investors and others to solicit support for an independent slate of director candidates or other reforms that are being proposed.

For example, in 2021 a hedge fund named Engine No. 1 ran a short slate of candidates at ExxonMobil Corp. and sought to meet with various investors to explain why they should vote for the short slate. Although Engine No. 1 did not hold enough shares to require a Rule 13D filing, the concern was raised that an investor who met with Engine No. 1 and then voted for the slate – with nothing more – could be considered a “participant” in Engine No. 1’s “solicitation” for purposes of Rule 14A. That is plainly a misinterpretation of current law, but the fact that the concern even arose illustrates the importance of adding clarity to this area of the law.

It is important for the Commission to re-enforce the point that these types of communications can and should continue. If a hedge fund or other investor is proposing to change or influence control of a company, it is important for all investors to understand the issues, and hearing directly from the proponent of such changes can be invaluable.

We make this point because the proposed rule is ambiguous on several points. First, although the preamble states any “direct or indirect” obligation should exist pursuant to an explicit agreement, the text of proposed subsection (c)(2) does not contain that language. We believe that clarity on this point is useful to keep the

concept of an “indirect” obligation within clearly defined bounds and not stifle legitimate collective action.

Our second point involves the proposed re-definition of the concept of a “group.” Under the proposed new definition, an “agreement” would no longer be required to conclude that a “group” exists, although the presence of an agreement would be a sufficient, though not a necessary reason to conclude that a “group” exists. 87 Fed. Reg. at 13867.

Consider this scenario:

- There is a meeting between an investor with a hedge fund that has filed a Form 13D and is soliciting support for a short slate of director candidates at Company A.¹

- That investor concludes, exercising its own independent discretion and consistent with all obligations to its investors, and with no obligation to the hedge fund, to vote for one or more of the hedge fund’s candidates.

- That investor is so persuaded by the hedge fund’s arguments that it publicly states an intention to vote for one or more independent candidates and urges its fellow shareholders to do likewise.²

- There is no cooperation agreement, joint voting agreement or other agreement – written, oral or tacit -- between the investor and the hedge fund or anyone else.

Such dialogues now occur with great regularity, and there is no risk that an investor who attends a briefing by a hedge fund or engages in the conduct described above would be considered as part of the hedge fund’s “group.” We assume that conclusion would not change because of the absence of an “agreement” or “obligation,” but there is some ambiguity created by the proposed new definition of “group.”

¹ This hypothetical assumes that the hedge fund has made all necessary filings under Regulations 14A and is in compliance with that regulation.

² We assume that any such statement would have to qualify as an exempt solicitation under Regulation 14A and further, that any such shareholder would not be considered a “participant” in the hedge fund’s “solicitation” so long as the investor is not soliciting proxies for the slate or providing financial support to the hedge fund’s efforts.

The closest that the proposal comes to dealing with this issue is in footnotes 47 and 149 (87 Fed. Reg. at 13854, 13872-73), but the discussion is ambiguous, with the latter stating, for example, that the answer depends on “facts and circumstances.” Further, note 149, states that Rule 13d-6(c) is designed to “avoid chilling communications” so long as “those activities are undertaken without the purpose of effect of changing or influencing control of the issuer (and are not made in connection with or as a participant in any transaction having such purpose or effect.” 87 Fed. Reg at 13872. But this statement refers only to communications with *issuers*. What about communications with investors such as a hedge fund that is soliciting support for a slate? At what point, and based on what sort of activity, could an investor be deemed to be “acting as” part of the hedge fund’s group?

Additional ambiguity arises in Rule 13d-6(c)(1), which states that the proposed exemption would cover the following:

Communications among or between such persons are not undertaken with the purpose or the effect of changing or influencing control of the issuer, and are not made in connection with or as a participant in any transaction having such purpose or effect, including any transaction subject to § 240.13d-3(b).

The “in connection with . . . any transaction” language could chill dialogues that routinely occur and that the Commission has not suggested require additional regulation. We thus believe that the Commission should clarify, modify or delete this paragraph (1) altogether. As we read the proposal, the Commission could achieve the stated goals of the Release simply by adopting paragraph (2), which states that the proposed exemption is available to “[s]uch persons, when taking such concerted actions, are not directly or indirectly obligated to take such actions”, with language to address the point above about the need to clarify the nature of “indirect” obligations.

For these reasons we would answer “no” to Question 67 (“Should we adopt Rule 13d-6 as proposed?”) As for Question 68, which asks about the conditions necessary for the exemption to apply, we recommend deleting proposed paragraph (1) and retaining proposed paragraph (2) with the clarification noted above about the need to define more clearly the concept of an “indirect” obligation.

2.) Question 69 asks whether there should be a separate exemption for communications regarding shareholder proposals. We do not believe an explicit exemption is needed so long as the Commission, in the rule release to any final rule, makes it clear that the exemption covers communications regarding proposals to be submitted under Rule 14a-8.

In that regard, we do not recommend drawing a distinction between binding and non-binding resolutions. The vast majority of proposals are non-binding, and under existing interpretations of Rule 14a-8, the only permitted type of binding resolution is a proposed by-law. Such bylaw proposals are infrequent at best, are unlikely to be adopted, and may – or may not – have anything to do with control.³

We thus do not see the need for an additional paragraph in proposed Rule 13d-6(c), although the explanatory statement issued with any final rule should expressly state that the exemption covers communications regarding proposal submitted under Rule 14a-8.

3.) We do, however, believe that there should be either a specific exemption or an explanation in the text that the proposed Rule 13d-6(c) is available to shareholders seeking jointly to engage in a “vote no” campaign against individual directors in uncontested elections.

The director electoral process is something that has changed significantly since Rules 13 and 13G were last revised, and an amendment to recognize this fact is important to effective corporate governance.

Until the early 2000s, it was impossible to vote “no” against an individual board nominee; one could only “withhold” one’s proxy. Thus, the outcome of uncontested director elections was never in doubt.

Over the last 20 years, however, and in response to shareholder demands for reform, many publicly traded companies have adopted bylaws to move from this “plurality vote” standard and have adopted a “majority vote” standard, in which a director candidate must receive more “yes” votes than “no” votes. If the “no” votes prevail, the losing director does not automatically lose his or

³ So far as we are aware, the only binding by-law resolution ever adopted at a company annual meeting over the board’s objection was at Bank of America Corp., where the by-law generally split the role of board chairman and chief executive officer.

her seat, but may have to submit a letter of resignation, which the board of directors may – or may not – accept.

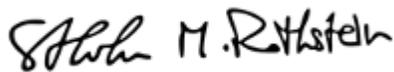
This change in the regulatory landscape has encouraged some investors to mount “vote no” campaigns on specific issues, usually against an incumbent director because of his or her role on a given topic, *e.g.*, against the chair of the compensation committee if there are concerns about the company’s executive compensation practices.

Such “vote no” campaigns do not implicate the sort of “control” concerns that underlie Rule 13D, yet these efforts can send a powerful message to board members about shareholder preferences on specific topics that might not otherwise receive adequate attention.

We therefore urge the Commission to exempt communications between investors in connection with a possible “vote no” campaign against director candidates in uncontested elections.

We appreciate the opportunity to share our views with the Commission and its staff. Thank you in advance for your consideration of these points. For further information, please contact the undersigned at srothstein@ceres.org.

Respectfully submitted,



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